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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
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Working Group on Indigenous Populations
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STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS POPULATIONS

Information received from indigenous peoples' and non-governmental organizations

Introduction

1. By its resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish annually a working group on indigenous populations to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually, and to give special attention to the evolution of standards concerning the rights of indigenous populations.

2. The Sub-Commission, in its resolution 1992/33 of 27 August 1992, requested the Secretary-General to transmit the report of the Working Group on its tenth session (E/CN.4/Sub.2/1992/33) to indigenous peoples' and non-governmental organizations for written comments and suggestions for the completion of the second reading of the text of the draft declaration on the rights of indigenous peoples (E/CN.4/Sub.2/1992/33, annex I) at the eleventh session of the Working Group. The Commission on Human Rights endorsed this request in its resolution 1993/31 of 5 March 1993. In accordance with these resolutions, appropriate communications were sent to Governments. The present document contains replies received as of 3 June 1993. Further replies, if any, will be included in addenda to this document.

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Centre for the Study of Developing Societies (India)

General observation

3. The draft declaration in respect of the indigenous peoples contains several provisions for international action including action by transnational corporations. For instance, at part III, item 20, it has been mentioned, "Indigenous people have the right to require that States and domestic and transnational corporations consult with them and obtain their free and informed consent prior to the commencement of any large-scale projects." While it recognizes the right of the indigenous peoples to be consulted, it also invests transnational corporations (TNCs) with the right to obtain "free" and "informed consent" of the indigenous peoples. In the context of the experience of many third world countries, not only about the operations of TNCs but even of the International Monetary Fund and the World Bank, as aptly reflected in the statement from the Third General Assembly of the Ecumenical Association of the Third World Theologians held at Nairobi from 5-16 January 1992: one must be very cautious that the rights of the "indigenous" do not become a euphemism for the international right of TNCs and other international agencies which have to establish their credentials convincingly.

4. Apart from problems of this type, the global socio-political order which provides the backdrop of the rights of the indigenous peoples should be indicated in the preamble to the declaration; otherwise the declaration, which has many laudable postulates, can be hijacked to reinforce world hegemonic interests.

5. That the apprehension of a rearguard action by vested interests in the name of indigenous rights is not unreal would be obvious from two facts. To enable the representatives of the indigenous peoples to participate in the annual deliberations of the working group a "voluntary fund" was created. The major contributors to this fund include a transport company, not known for much humanitarian concern. It is operated by a Board of Trustees, at least one of whose members is an "indigenous". There is also a United Nations working group. A close look into the composition of the working group shows that it is not democratically constituted.

6. For wider participation, a meeting is held annually where spokesmen of the indigenous peoples participate; some of them are financed from the voluntary fund. the criteria of selection of the representatives of the indigenous peoples for receiving such assistance do not appear to be clear. In the case of India, the gentleman who was provided financial support year after year was, according to his own admission, chosen by "accident".

7. It also appears that there is an understandable vagueness in the matter of identification of the indigenous. The declaration does not define the "indigenous". There is, however, a working definition, said to be prepared in 1983 by a Special Rapporteur appointed by the United Nations in 1972. In the discussion reports of the United Nations Working Group, estimates of the world's indigenous peoples have been projected to be around 300 million. An organization linked to the United Nations has stated that in Europe, except for the Inuits and Samis of the circumpolar region, no peoples, not even the

Gypsies and Basques, are recognized as indigenous because Europe was not under colonial rule. But by a curious twist of logic, 70 million persons in China and a good number in Thailand, which were not under colonial rule, have been treated as indigenous. This criticism is not a criticism of the merit or demerit of certain identifications; it is a criticism of the double standard of the approach which makes the exercise suspect. The suspicion gets further reinforced when one finds that an International Labour Organization representative had stated in a meeting sponsored by the United Nations working group that certain matters which the ILO could not go into due to structural constraints during the preparation of the ILO Convention on Tribal and Indigenous Peoples in 1989, would be dealt with in this forum. It is not clear whether he was officially authorized to make this statement. If not, he had gone beyond his mandate.

8. The draft declaration contains five parts. Part I is preceded by 16 paragraphs without any heading. Obviously these constitute the preamble. In the present review these 16 paragraphs will first be discussed under the general rubric "preamble". These paragraphs have not been numbered in the draft declaration. In this review the references to the numbers in the preamble relate to the sequence in which the paragraphs occur. In the different parts of the declaration the various items have, however, been numbered. In the present review these have been indicated by the same item numbers. With this clarification, observations will first be made on the preamble.

9. In the preamble paragraphs 1, 2, 3, 4, 8, 9, 11, 12 are non-controversial and should be accepted by all concerned with democratic values and human rights. But the remaining parts require some scrutiny.

10. Paragraph 5 in the preamble states that "treaties, agreements and other constructive arrangements between States and indigenous peoples continue to be matters of international concern and responsibility". This seems to be either rhetoric or double-speak. ILO was closely associated with the formulation of the declaration. Convention No. 169 of the ILO adopted in 1989 speaks of a pre-invasion indigenous "population" and not "people", thereby giving an escape route to the European invaders not to reopen the issue of restoration of the rights of the peoples which were disclaimed during the nineteenth century, notwithstanding the presence of pre-existing treaties, agreements and constructive arrangements. On the other hand, this paragraph may provide a handle to the autocrats in Asia and Africa with whom the colonial rulers made agreements and constructive arrangements over the heads of their peoples, to demand the restoration of the rights bestowed by the colonial rulers in self-interest, even though they have since been thrown out by the indigenous peoples concerned through democratic means.

11. Paragraph 6 of the preamble welcomes the fact that "indigenous peoples are organizing themselves in order to bring an end to all forms of discrimination and oppression". It is a good statement as far as it goes. But it gives an isolationist stance to the struggles of the indigenous peoples. While it had been a mistake on the part of many Marxists in the past to consider the indigenous problem purely as a class problem, ignoring the problems of trans-class cultural and historical rights, it would also be wrong

to project the problem of the indigenous peoples completely in isolation from the shared problems of the disadvantaged sections of the polity. The statement requires to be elaborated to put it in perspective.

12. Paragraph 7 speaks of the need to respect the rights of indigenous peoples to their lands, territories and resources which stem from their history, philosophy, cultures and spiritual and other traditions. By itself it is a good statement. But then it is to be examined whether item 14 in part II is congruous with this statement. Logically it implies that technical financial aid should be compatible with the history, philosophy and traditions from which the rights emanate. Otherwise, through aid the nature of the right will be changed and the source of the sanction of the right will be appropriated by the aid-giving agency. there are case studies to show that this has happened and also there are instances of resistance to the same by the tribal communities.

13. Paragraph 10, to the effect that lands and territories of the indigenous peoples should not be used for military purposes without their consent, is marked by equivocation. It also means that military use can be made with their consent and it is well known how in some cases "consent" is manipulated. This statement should be made contextual, giving an analysis of the present day geopolitical pressures operating to the disadvantage of the tribal and indigenous peoples in particular and of the third world countries in general.

14. Paragraph 13 is political tightrope-walking. For historical reasons identification of the indigenous as distinct from others in Asia and Africa, particularly in Africa, is a complex problem. In the Americas, Australia and New Zealand it is much more simple. In Africa attemtps to hustle change in relations of peoples with their respective States had shown disastrous effect. On the other hand, in Canada, where the problem is much simpler, an attempt in the direction suggested has failed. In the light of these experiences the paragraph should be changed.

15. Paragraph 14 is completely misleading. Some of the international covenants, including the Universal Declaration of Human Rights, which enshrines the right of self-determination, have undergone considerable change in their meaning in the post-war period because of three facts: (a) decolonization of a large part of the world; (b) ecological imperatives; (c) global interdependence and the growing importance of non-State institutions. There are judicial pronouncements taking cognizance of some of these changes. The irony is that while the West has shifted considerably from the earlier concept in their collective hegemonistic interest, they are trying to promote it in the third world countries. This paragraph seems to reflect the Western perspective. It is a hybrid of Hobbsian and Lockean tenets in modern garb.

16. Paragraph 15 can be operated only if the nuances of self-determination in diverse contexts are amplified. Besides, one must didfferentiate between self-determination as a principle and as a right.

17. Paragraph 16 will be looked upon with suspicion by third world countries, so long as United Nations forums are seen as dominated by a single Power or a cluster of Powers.

18. This critique of the preamble to the draft declaration implies that either the concept of indigenous should not apply to Asia and Africa and that differentiation of indigenous and tribal, as is done by the ILO, should be retained or that the declaration should be redrafted taking into consideration the sensitivities and realities on the ground prevailing in Asia and Africa. The historical moment when the international forums are dominated by a single Power and its secondary alter-egos, is not the right one for the declaration of the type that has been drafted. But existence of exploitative interests violating basic human rights of the tribal and the indigenous peoples in various countries, including the third world countries, should not be overlooked. A realistic declaration should certainly be made and should be enforced through informed cooperation of indigenous peoples, other collectivities with broadly similar interests and human right activitists.

19. Coming over to specific items included in the declaration, the following comments are made:

Part I

Item 1 - It speaks of "right of self-determination in accordance with international law", an integral part of which is the "right to autonomy and self-government". Obviously it is marked by equivocation and, besides, interpretation of self-determination in international law is not uniform, even among the members of the judiciary.

Item 2 - Should be universally recognized in principle and the modality of operationizing the same should be worked out through authentic broad consultation.

Part II

Items 4 and 5 - Should be operationalized by all. But there are indications that in the context of the functioning of United Nations Working Group on Indigenous Populations, some individuals, if not groups, do not hesitate to transgress the principle enunciated at item 4.

Item 6 - It is not clear how individual self-identification comes within the ambit of this declaration. Besides, technically individual cultural characteristics makes no sense.

Item 7 - Should be accepted by all. But this should not invest any right in any individual or group to carry on unfounded propaganda against others in the name of the indigenous peoples. This has happened and it seems that there is a concerted effort in this direction by various international agencies and motivated persons.

Item 8 - This item speaks of indigenous rights to revive and restore cultural, religious and spiritual property taken from them without their free and informed consent or in violation of their own laws. This is certainly desirable in principle but the snag lies in the proviso of "free and informed consent". How this will be determined requires some elaboration.

Item 9 - Should be accepted by all.

Item 10 - Should be accepted by all.

Item 11 - This item speaks of the indigenous right to their own educational system and maintenance of educational institutions of their own. This right can be exercised with reference to indigenous culture, religious and philosophical traditions. This has been found to be misused by powerful international and national elite forums, for incarnation of alien values.

Item 12 - This item speaks of the dignity and diversity of indigenous culture, histories and traditions. This is a matter of great importance. Even now histories of indigenous and tribal peoples during the colonial period as presented by colonial historians continue in many educational institutions. This requires to be rectified through a crash programme which may be supported by the United Nations Educational, Scientific and Cultural Organization.

Item 13 - This should be acceptable to all.

Item 14 - At the present juncture of history with the concentration of hegemonic power mainly in one country, the third world States have a role to thwart further incursion of hegemonic power. International aid may be used to negate their historical role. It cannot be automatic to bypass the States of the third world. Besides, it should be reformulated so that dependency syndrome is not fostered through international aid; in that case the much vaunted right of self-determination will mean weakening of intra-national cooperation and promotion of international dependency.

Item 15 - The historical association of the indigenous and tribal peoples with their habitat in diverse manners must be recognized.

Item 16 - This item speaks of collective and individual rights over lands, etc. It should be clearly stated that where individual rights are subsumed within collective rights, the same cannot be violated by individuals, otherwise the principle enunciated here can be misused. In fact, it has been misused in the past and is being misused today with the support of international aid-giving agencies.

Item 17 - This item speaks of restitution of lands and territories which were confiscated, occupied, used or damaged without their free consent. Much of these processes took place during the colonial rule and much of what has happened in some countries in the post-independence period is the operation of the inertia of the system created by colonial rulers. The erstwhile colonial rulers should pay for restoration of the rights and for repair of the damages. The item should be modified accordingly.

Item 18 - This item speaks of indigenous peoples' right to protection and rehabilitation of their environment and of the right to adequate assistance, including international cooperation. This item, by implication, means international intervention, directly or indirectly. This should be modified and, depending on the historical context, the concerned States, in consultation with the tribal peoples, can claim international cooperation to repair the damages and protect the rights.

Item 19 - In this item intellectual property rights have been projected in a much more diluted form than in an earlier draft. It seems that the United Nations Working Group has capitulated to some extent to the pressure of the World Intellectual Property Organization, which took a position in 1991 that the indigenous peoples are not entitled to hold intellectual property rights.

Item 20 - This item puts transnational corporations at the same level as the States in the matter of consultation with the indigenous peoples about projects to be implemented in their areas. This, as mentioned earlier, is really investing TNCs with the right to usurp the roles of the State and therefore is unacceptable.

Part IV

Item 21 - This item refers to indigenous rights over traditional means of subsistence. These traditional rights were regulated by ecological ethics. Within the same framework these rights must be continued; but the traditional rights must not be used for the national or international market transgressing traditional ecological ethics. Unless this provision is incorporated in the declaration the traditional rights may be manipulated by unscrupulous monopolists for paving the way for green capitalism and for ultimately destroying the conditions for exercise of the rights.

Item 22 - Indigenous rights to special measures for improvement of their economic and social conditions is a minimal human right and must be agreed to by all.

Item 23 - Indigenous rights to determine through their own institutions programmes for improvement of the conditions of their life must be agreed to by all, subject to the condition that exercise of these rights is not externally manipulated to destroy the possibility of building up a partnership with the immediate neighbours on the principles of equity, mutual respect and trust.

Item 24 - Indigenous rights of traditional medicines and health-care practices must be accepted by all without affecting their right to access to health-care services in other systems as well.

Item 25 - This item speaks of legal pluralism and non-discrimination in political, economic, social and cultural life. This principle should certainly be applied universally.

Item 26 - This item speaks of the participatory right of the indigenous peoples at all levels of the Government. It must be accepted, but it should also negate the right of intervention by external agencies exclusively, to promote the interest of the indigenous peoples as implied in some of the other items already mentioned.

Item 27 - This item speaks of right of autonomy of indigenous peoples in several matters. In principle the right of internal autonomy must be accepted; at the same time equitable interdependence at the country level similar to inter-country interdependence should also be highlighted.

Item 28 - This item speaks of indigenous rights to decide upon structures of their autonomous institutions. In principle this right must be accepted but the relevance of historical and geopolitical contexts must also be mentioned, otherwise there would be scope for international hegemonic manipulation.

Item 29 - This item speaks of rights of indigenous peoples to determine the responsibilities of the individuals of their own community consistent with the universally recognized human rights. It is now recognized that many of the universally recognized human rights are rights defined by the industrialized West with a Hobbesian world view. While rights of the indigenous peoples to define rights and responsibilities of the individuals belonging to them should be recognized, so-called universally recognized human rights must also be re-examined.

Item 30 - Rights of transborder indigenous peoples to maintain traditional contact have been mentioned in this item. In principle this should be accepted and should be operationalized contextually in an explicitly spelled-out world system perspective.

Item 31 - This item stipulates that indigenous peoples have the right to claim that States or their successors honour treaties and other agreements concluded with indigenous peoples and that they have the right even to invoke international intervention to settle disputes. This cannot be accepted in an unqualified manner. Colonial rulers made many agreements with elements among the indigenous peoples in a selective manner to serve their colonial interests. Some of these were rejected by the indigenous peoples even during the colonial rule; some were discarded after independence through democratic processes. The statement must be modified to take care of such situations.

Item 32 - International intervention in the settlement of disputes of indigenous peoples with States has been provided for in this item. This can be operationalized in an equitable world system perspective. It is unacceptable in the face of the obduracy of powerful countries to accept international discipline, even in recent years.

Items 33 and 34 - These items enjoin States to take effective measures to ensure full enjoyment of indigenous rights, other human rights and fundamental freedoms as these constitute the minimum standard for the survival and well-being of the indigenous peoples of the world. In fact, these rights are essential for the survival and well-being of human life in the world, but the States in the third world countries can operationalize these in an equitable world system. The industrialized countries must show more understanding during the General Agreement on Tariffs and Trades and the United Nations Conference on Trade and Development negotiations; should be less protectionist about the advantages they have gained in questionable manners; they should also be more forthcoming to repair the damages they have caused over the centuries, and should be more humble in claiming the superiority of their techno-economic system. All these are necessary to create an environment wherein the States in the third world countries can operate in the manner stipulated.

Item 35 - It is mentioned that nothing in this declaration may be interpreted as diminishing or extinguishing existing or future rights of the indigenous peoples. This is certainly implied in the discourse and there cannot be any second opinion regarding it.

Item 36 - This item stipulates that indigenous peoples have the right to special protection and security in periods of armed conflict and, ancillary to the same, some special measures have also been stipulated. All the provisions in this item should apply to all citizens, all over the world. Otherwise, this negative discrimination can be used by hegemonic powers in their own interest.

Item 37 - Indigenous customary rights are intended to be protected. This should certainly be done. But so-called universal fundamental rights, which are very much tinged by the western capitalist world view, require to be re-examined. In fact, some elements of the indigenous world view and customary regulation in human relations seem to have a potential for universal application. This item should be re-examined shorn of Eurocentric bias.

Item 38 - It is stipulated that indigenous peoples should not be forcibly removed from their lands or territories. Where relocation occurs, it should be with the free and informed consent of the peoples concerned and after agreement of a fair and just compensation and, where possible, the option of return. In principle, this must be accepted along with its implication for the production, consumption and marketing systems of commodities globally. If there are relevant international instruments relating to them, the same should be mentioned here; if not, mention should be made of the measures to be taken by the concerned United Nations forums to introduce a globally relevant systemic framework.

Item 39 - It has been stated that application of the provisions of this declaration shall not adversely affect the rights and benefits of the indigenous peoples concerned or of any other national of a State pursuant to other international instruments or laws. This is an inadequate proposition. The United Nations specialized and other international agencies should re-examine the adequacy or inadequacy of their respective instruments or laws for operationalizing the generally acceptable provisions of the draft declaration. They should do this in 1993, the International Year of the World's Indigenous People, as a crash programme. As it is, the declaration seems to be more concerned to reinforce interventional mechanisms of the international agencies by using the umbrella word "right of the indigenous peoples". If one follows the sequence of procedures followed step-by-step leading to the formulation of the present draft, and if one examines the ancillary documents, one cannot but feel that a noble cause is being used in a way which may or may not be noble in intention, but in the present world context has little chance to be noble in its outcome.